

Kashmir: A Prologue to a Farce or a Tragedy

Adeel Hussain

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In the mid 19th century, sovereignty was transactional. This held particularly true for colonial enterprises. The British, for instance, auctioned off large chunks of conquered land to rich merchants. In India, some of these territorial deals were turned into [so-called princely states](#). By transferring foreign affairs and defence to British India, these princely states would become, at least in theory, internally sovereign.

This form of indirect rule had [many benefits for the Crown](#). For one, this set-up allowed the British to continuously fill their war chest with gold coins, as the newly-minted princes were pressured to pay hefty tributes to retain their titles and internal autonomy (and, without a shred of irony, for the “protection from outside invaders”). By gently cultivating a local-ish gentry that could mediate between the new white *sahibs* – securely seated on the *darbar* in Delhi – and common Indians, this set-up was also seen as an effective way to [‘civilize’ the native population](#). To become a prince, being rich and loyal to the British Crown was enough – a strong connection with the local population was discouraged.

Kashmiris, a large percentage of whom had [adopted Islam in the fourteenth century](#), were lukewarm when Gulab Singh, a Hindu trader, ascended to the throne in 1846 after buying their state cheaply from the East India Company. Yet some Kashmiris were optimistic about his appointment. They hoped that the Hindu *raja* (ruler) would reinstate their rights to perform religious rituals, which had been robbed from them during the 40-year Sikh rule. Sikhs, to be fair, were probably seeking revenge for their own brutal subjugation under Mughal rulership.

In those days, Kashmiris were not allowed to call the *adhan*, the Muslim call to prayer (punishable by 40 lashes) or slaughter cows on *Eid al-Adha* (punishable by death). But Gulab Singh was not the liberator from Sikh subjugation for whom Kashmiris yearned. He turned out to be even more oppressive. As one of his first acts, he transferred most of the land over to Hindu pundits. Their fields were ploughed and irrigated by Kashmiri Muslims under employment conditions that came dangerously close to chattel slavery. While former Kashmiri rulers had already struggled to transport grain and rice up the hilly state during the icy winter months, [Gulab Singh’s colossal mismanagement of state funds](#) made malnourishment and starvation the rule rather than the exception.

Fast forward to the twentieth century. The legal conundrum over Kashmir’s accession to India [was a messy affair](#). In 1947, when the subcontinent was split along religious lines, an event commonly remembered as *batwara* (partition), the Muslim majority regions of British India [grouped together as Pakistan](#). Princely states, of which there were 565 and which covered around forty percent of India’s

territory, enjoyed [special constitutional provisions](#). Here, it was not the religion of the population that determined their accession to either India or Pakistan. Rather, this decision was reserved for the *raja*. However, if a *raja* did not make a decision until 15 August 1947, the day power was officially transferred, the State would become an independent sovereign entity, thereby losing all links to the British Raj, the Indian Dominion or Pakistan's Islamic Republic.

Albeit briefly, and strictly legally speaking, three states acquired full sovereignty in this way: Junagadh (Muslim ruler, mostly Hindu population), Hyderabad (Muslim ruler, mostly Hindu population), and Kashmir (Hindu ruler, overwhelmingly Muslim population). Just months later, India had [intervened militarily in all three](#). When Junagadh's ruler acceded to Pakistan a few weeks after Partition, India replied with full-blown military overthrow. For Patel, then India's chief negotiator with the princes, the "desire of the Hindu public" could not be ignored. Nehru, India's Prime Minister, wired to his Pakistani counterpart that he was ready to accept any "democratic test" – only to backpedal and hastily stage a plebiscite that [even sympathetic bystanders called a farce](#). Hyderabad was violently annexed in 1948.

Article 370

Initially, Kashmiris received a more hospitable treatment. As their state shared a border with Pakistan, was home to many Hindu holy sites, and a key source for water, it was of much higher strategic importance than Junagadh and perhaps even Hyderabad. Nehru [personally patched together a deal](#) that gave Gulab Singh's great-grandson, Hari Singh, internal autonomy in exchange for surrendering defence, communication (!), and foreign affairs to the Indian Union – just like under the British. A slightly modified version of this deal later became part of the Indian Constitution, where [Article 370](#) severely limited Delhi from intervening in Kashmir's internal affairs. The only way the central government could make laws that applied to Kashmiris was in concurrence with the State Government.

This agreement has hiccupped into sporadic waves of disagreement in the first decades of the Indian Republic. Over time, it was turned into an obscure relic occasionally whipped up by politicians from all corners to lament how India was still truncated by a deeply colonial constitutional structure. There were weighty arguments to get rid of [Article 370](#). Supporters of annulling Kashmir's special status argued that a full incorporation of Kashmir into India's economy would boost development and progress. It would also allow non-Kashmiris to own property in the state. As Amit Shah, India's Home Minister, promised during a parliamentary debate in the Lok Sabha, an annulment would also draw "[private schools, hospitals, and investment](#)" into the underdeveloped state. Further, it would benefit children from interstate marriages, who had Kashmiri a mother and a non-Kashmiri father. They would be able to stake a claim to their ancestral property.

Defenders of Kashmir's special status argued that an annulment would temper with the delicate balance struck between the State and the Centre and unleash violence that could last decades. It would also violate the Constitution, they hold, which sets out that only Kashmir's Constituent Assembly can modify the special provision given

in [Article 370](#). Therefore it came as a shock to many, when Narendra Modi, India's prime minister, toppled Kashmir's special status in August 2019, just a few months after he won a landslide victory in India's parliamentary elections.

The first people to be warned that the government was brewing something up were pilgrims visiting a Hindu shrine. In a widely retweeted government order, they were advised to [“curtail their stay in the valley and immediately take necessary measures to return”](#). Tens of thousands soldiers moved into the region. Opposition politicians were arrested in droves and imprisoned without trial. Secessionist leaders simply disappeared. The population at large was placed under curfew and severe travel restrictions were introduced, which put seven million people under unimaginable humanitarian strain.

The shutdown

On 4th August 2019 the government ordered network providers to curb the internet, cut off mobile phone coverage in the region, and block all landlines. They did this on the basis of the [Temporary Suspension of Telecom Services \(Public Emergency or Public Service\) Rules, 2017](#), a highly contested addition to the [Indian Telegraph Act 1885](#), which empowers the Government to temporarily suspend “telecom services due to public emergency or public safety”. The suspension rules drew early criticism for assigning only members from the executive to the review committee that is supposed to oversee the execution of these rules. When pressed in the Rajya Sabha (upper house) to give a detailed account under which circumstances the internet could be disrupted, Ravi Shankar Prasad, India's minister for Information Technology answered refreshingly honestly that [“In the modern times, disruption is integral to innovation.”](#) It comes as no surprise that when he was further pushed to justify what his Government was doing with the huge chunks of data it collected on its citizens, he responded that India was becoming [“a big centre for of data analysis”](#).

Already in August the editor of a local newspaper and the leader of the opposition in India's upper house had [filed a petition](#) to the Supreme Court questioning the constitutionality the ongoing five-month+ internet shutdown. On 10th January 2020, the Supreme Court finally got around to examining the case.

It had some repair work to do. In the past year alone the Court has caved countless time to executive pressure. Most blatantly this happened in the Babri masjid ruling. With heavily screwed logic the Court ordered a Hindu temple to be built on the plot of a 500-year old mosque, which was torn down in 1992 by a saffron-clad lumpen youth. The dispute over the plot, which Hindu right-wingers claim – with little factual evidence – is the birth place of the god *Ram*, was a key driver that catapulted the Bhartiya Janata Party onto the national stage. When interviewed in the aftermath of that ruling a retired Supreme Court Justice said perplexed: [“I cannot reconcile the conclusion of the judgement with the facts the Court has found. They are not compatible to my mind. That is what is disturbing me.”](#)

In the current ruling on the extended internet shutdown in Kashmir the Court did little to polish its tarnished reputation. It agreed with the Solicitor General that Kashmir

was indeed a region awash with weapons, secessionists and terrorists, calling it a [“hot bed of terrorist insurgencies”](#). The Court also agreed with the Solicitor General that [“Modern terrorism heavily relies on the internet”](#). Fortunately, the Court did not follow the Solicitor General Tushar Mehta in his Schmittian fantasy that in cases where national security is at stake the Court only possesses, if at all, a [“limited jurisdiction to interfere”](#) and that because of the high volume of orders made that breached fundamental rights (sometimes on a day-to-day basis) the State had no obligation to provide a complete list to the Court for judicial review. Here the Court pushed back hard. It reiterated its position from 16th October 2019, when it had asked the State to make all orders that potentially breached fundamental rights public.

To little surprise, the Court also found that shutting down the internet violates the freedom of expression (and the right to access information) protected under [Article 19\(1\)\(a\)](#) and the freedom of trade and commerce under [Article 19\(1\)\(g\)](#). After a brief excursion into the idea of proportionality (the Court was particularly impressed by the idea of a [“least intrusive measure”](#)), it arrived at the obvious conclusion that since the State had not provided a complete list of the orders and not even attempted to justify them according to any proportionality standard, [“a complete blocking/prohibition](#) perpetually [of the internet] could not be accepted by the Court.” Even if we were to follow the argument of the State, the Court held, it had to make a case that a) there was indeed a threat to the sovereignty and integrity of India and b) that the measures taken would only affect the fundamental rights in a [“minimalist way”](#) as laid out under [Article 19\(2\)](#).

A deeply unsatisfying ruling

For now, the Court is content if the State [“publish\[es\] all orders in force”](#) and, until the Government limits the [Telecom Suspension Rules](#) to temporary measures, conducts weekly reviews of its orders through the prescribed review committee. That this review committee consists of the Cabinet Secretary, Secretary to the Government of India Legal Affairs, and the Secretary of Government Department of Telecommunications, did not strike the Court as a conflict of interest (see [Section 5\(i\) Temporary Suspension of Telecom Services Rules, 2017](#)). Thus there remains something deeply dissatisfying about the ruling, where the Court should have ordered the network service providers to take up their operations again and provide internet to the area.

As expected, the State did not even attempt to seriously partake in the legal proceedings. Despite being repeatedly reprimanded by the Court, the Government did not provide a complete list of the orders infringing upon the fundamental rights of Kashmiris. At the time of this writing Kashmir is still cut off from the internet. Anyone who had banked on the Supreme Court to make good on the promise of fundamental rights will be disheartened.